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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE,

Petitioner,

vs.

ALFRED SPENCER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

George S. Beadle respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of California to review a judgment of the court pronounced on September 3, 1935, reported in 48 Pac. (2d) 678 (R. 102). The said court by its judgment affirms a judgment of the Superior Court of the State of California in and for the City and County of San Francisco for damages in favor of respondent and against petitioner and reverses a judg-

ment of the District Court of Appeal of the State of California, First Appellate District, Division One, pronounced December 28, 1934, reported in 40 Pac. (2d) 273 (R. 99), to which court an appeal was taken from the said Superior Court. Neither decision is reported officially as yet. Within the time specified by Rule XXX of the Supreme Court of the State of California, petitioner made application for a rehearing, which was denied by said Supreme Court on October 3, 1935 (R. 106), and in accordance with said Rule XXX said judgment of the said Supreme Court, pronounced September 3, 1935, became final at the end of the thirtieth day after the date of pronouncement, to-wit, on October 3, 1935.

Nature of Case and Questions Involved.

This is an action brought by respondent to recover damages for injuries sustained while he was employed by petitioner as a seaman on the vessel "Fort Bragg" which, at the time of the injuries, was lying moored to a dock at Vallejo, California, and engaged in discharging a cargo of lumber. The action was brought pursuant to the provisions of the statutes of the United States commonly known as the Jones Act (41 Stat. 1007; 46 U. S. C. A., Sec. 688), which in turn incorporates by reference what is popularly known as the Federal Employers' Liability Act (35 Stat. 65; 45 U. S. C. A., Secs. 51 to 59). The fourth section of the Federal Employers' Liability Act (35 Stat. 66; 45 U. S. C. A., Sec. 54), preserves to the employer the defense of assumption of the risk. Four questions are presented by the record:

First. In an action brought under the Jones Act by a seaman, who is not under articles and may quit his employment at any time without penalty or forfeiture, in which the employer pleads the defense of assumption of the ordi-

nary risks and hazards of the employment and supports the defense by evidence tending to prove that the risks in the instant case were ordinary and obvious hazards of the employment, well known to and appreciated by the seaman, is not the employer entitled to have the jury instructed upon the defense of assumption of the risk of ordinary and obvious hazards and the legal effect thereof?

Second. In such an action and under such circumstances, can the court so instruct the jury upon the issue of negligence as to withdraw completely from their consideration the issue of assumption of the risk of ordinary and obvious hazards?

Third. In such an action and under such conditions, where the negligence charged consists of furnishing an unsafe place to work, has the court a right to instruct the jury on this issue to the effect that they may take into consideration all of the circumstances of the case when those circumstances involve in part conditions which do not, as a matter of law, constitute negligence and which were not and could not have been the proximate cause of the injuries sustained?

Fourth. Is it not incumbent upon a seaman claiming damages under the Jones Act to establish negligence and causal connection between this and the injury?

The Reasons Relied Upon for Allowance of a Writ of Certiorari.

Respondent, a seaman employed on the "Fort Bragg," a coastwise vessel, was injured aboard the ship while unloading part of a deckload of lumber at a dock at Vallejo, California, and fell from his place of work into an open hold. He brought this action for damages against both Beadle Steamship Company, Ltd. and George S. Beadle,

under the terms of the Jones Act (Plaintiff's Opening Statement, R. 13). At the trial a non-suit was granted as to the defendant, Beadle Steamship Company, Ltd., a corporation, from which no appeal was taken, and it is consequently eliminated from the case. The jury returned a verdict against the petitioner, George S. Beadle, for $10,000.00, which the trial court reduced to $7,000.00 on motion for a new trial (R. 10).

The amended complaint alleged that respondent suffered numerous injuries of a serious nature through the negligence of petitioner in failing to provide respondent with a reasonably safe place to work. The particulars in which petitioner failed in this duty are alleged to be in piling slingloads of lumber on the deck next to the open hold of the vessel without piling or properly securing the lumber, and failing to provide safeguards around the hold; that as a result of this negligence certain lumber gave way under respondent as he was attempting to fasten a loading sling under a slingload of this lumber, precipitating him into the hold (R. 2-3).

Petitioner's answer denied negligence and set up as an affirmative defense assumption of the risk of ordinary and obvious hazards (R. 6-7). Instructions on the issue of assumption of the risk of ordinary and obvious hazards were requested by petitioner (Instructions Nos. II, IV (R. 94), and No. XI (R. 97)). All of these instructions were refused and no instruction whatever was given upon the issue of assumption of the risk, apparently on the theory that such defense was not open to petitioner in a case of this character.

The evidence in support of the issue of assumption of the risk disclosed the following facts: Respondent was not an articled seaman but, on the contrary, was employed substantially at will and could quit voluntarily without

penalty or forfeiture except that there would be three days delay in giving him his pay (R. 14, 45). If he was discharged for disobedience he had to be paid immediately (R. 45). He was paid just like a land employee and signed the payroll (R. 51). The ship's hold was open, which fact was admittedly known to respondent, who made no protest concerning this condition (R. 30, 32). In fact he assisted in removing the hatch covers at San Francisco before the ship sailed for Vallejo (R. 47). The lumber on which he was working was so close to the open hold that if he fell he would almost certainly fall down into it. When discharging, it is not practical to keep the hatches closed because lumber in the hold may be wanted (R. 71), and there is no method of knowing in advance when the need for discharging from the hold may arise (R. 70). Respondent also knew that no safety lines or other safeguards were present to prevent him falling into the hold should he slip from his place of work (R. 31, 50). There was evidence given on behalf of petitioner that he was standing at the time he fell, on hand stowed lumber of the dimension of 1" x 12" (R. 87), and hand stowed or piled lumber is, according to respondent, good and proper stowage (R. 24). He was at the time of his injury pursuing a method of work in disobedience of specific orders and instructions (R. 53, 59, 60, 61, 82). There were other and safe ways of performing the operation in which respondent was engaged at the time he fell (R. 58, 59). There were appliances called pick-up hooks (R. 58), which could have been used, available aboard the vessel (R. 55), and which respondent did not use. Respondent had been a seaman since 1908 (R. 13), was thoroughly experienced, had made other voyages on the "Fort Bragg" and other lumber carriers, and had had at least seven or eight years' experience in loading and discharging lumber carriers (R. 43).

Instructions on all of these issues were tendered by petitioner (Instruction No. VII, R. 95; Instruction No. XI, R. 96; Instruction No. VIII, R. 95, Instruction No. II, R. 94; Instruction No. VI, R. 95; Instruction No. XIX, R. 98). All were refused by the court and no equivalents were given.

In view of this evidence, the District Court of Appeal held that petitioner was entitled to have the jury instructed on the theory of assumption of the ordinary and obvious risks of the employment and that the trial court's refusal to do so was reversible error. Accordingly, it reversed the judgment. (Opinion of the District Court of Appeal, R. 101.) The Supreme Court of California held that "the facts do not present such a case as without question entitles the defendant to instructions on the question of assumption of risk and the withholding of instruction on that question, if error, was not prejudicial to him" (R. 105-106). It, therefore, affirmed the judgment.

Petitioner also requested an instruction to the effect that the open hold could not be the proximate cause of the respondent's injuries (Instruction No. XIV, R. 97). This instruction was refused and instead thereof the court, of its own motion, gave its Instruction No. XV-a (R. 91) and Instructions No. III (R. 89), No. IX (R. 90), both requested by respondent, and No. II (R. 91). This last instruction had been prepared by petitioner, but was amended by the court, as appears from the record. The effect of these four instructions was three-fold. In the first place it permitted the jury to take into consideration the open hold as an element of negligence, whereas it is not negligence as a matter of law to have the holds open when vessels are loading and discharging.

The Gladiolus, 21 Fed. 417;
Smith v. *United States,* 18 F. (2d) 110.

In the second place, these instructions allowed the jury to find that the open hold constituted the negligence which proximately caused the respondent's injuries. And lastly, these instructions completely withdrew from the jury all questions of assumption of the risk because the jury was permitted to consider the ordinary and obvious hazard of the open hold as an element of negligence.

In actions brought under the Federal Employers' Liability Act, it has been held by this Court that proof of negligence alone does not entitle the plaintiff to recover. The negligence complained of must be the cause of the injury.

Chicago, Milwaukee & St. Paul R. R. v. *Coogan*, 271 U. S. 472, 70 L. Ed. 104;

Northwestern Pacific R. R. Co. v. *Bobo*, 290 U. S. 499, 78 L. Ed. 462.

In respondent's opening statement his counsel said the lumber upon which he was standing "toppled with him and some of the lumber fell over with him, threw him down off this narrow shelf into the open hold" (R. 13). Respondent himself confirms this statement by testifying that the lumber upon which he was standing, "the outer tier gave way, shifted," thus causing him to lose his balance and fall into the hold (R. 42). Obviously, therefore, the negligence, if any, which proximately caused him to fall, has to do with the failure to furnish him with a secure foundation upon which to work. The fact that the hold was open was not negligence, and neither was it the proximate cause that made the respondent fall. Yet the court, by its Instructions Nos. III (R. 89), IX (R. 96), and XV-a (R. 91), told the jury that they might in effect take into consideration in determining both the issues of negligence and proximate cause, the circumstance of this open hold.

This Court has not directly passed upon the applicability of the defense of assumption of the ordinary risks and hazards of the employment in any case brought under the Jones Act. The decision of the Supreme Court of the State of California on the Federal questions of substance presented by this record, is not in accord with the applicable decisions of this Court. The Supreme Court of California has, in substance and effect, emasculated the fourth section of the Federal Employers' Liability Act, and has denied the applicability of the defense of assumption of the ordinary risks and hazards in cases arising under the Jones Act. It has decided in this case Federal questions of substance in complete disregard of the controlling decisions of this and the lower Federal Courts. It is submitted that to permit this California decision to stand would cause confusion and uncertainty in future actions in California brought under the Jones Act, and would destroy the uniformity of the maritime law and of the application of the act throughout the United States.

Brief.

A brief in support of this petition is filed herewith.

Prayer.

WHEREFORE your petitioner prays that this Honorable Court will be pleased to issue its writ of certiorari to the Supreme Court of the State of California, commanding said court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said court: "No. SF-15,384, Alfred Spencer, plaintiff, *vs.* Beadle Steamship Company, Ltd., a corporation, and George S. Beadle, defendants, George S. Beadle, defendant and appellant," to the end that said case may be reviewed and determined by this Court as provided by

law, and that said judgment of said Supreme Court of the State of California may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated San Francisco, California, December 23, 1935.

HAROLD M. SAWYER,
Attorney for Petitioner.

Certificate of Counsel.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Harold M. Sawyer, being first duly sworn, upon his oath deposes and says: That he is the attorney for the petitioner in the above and foregoing cause; that he has read and considered the foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and in affiant's judgment such petition is well founded; that this petition is presented in good faith, and the same is not interposed for delay.

HAROLD M. SAWYER,

Subscribed and sworn to before me this 23rd day of December, 1935.

[SEAL.] LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE,

Petitioner,

vs.

ALFRED SPENCER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

Upon appeal from the judgment on the verdict to the District Court of Appeal of the State of California, First Appellate District, Division One, that court wrote an opinion which is reported in 40 Pac. (2nd) 273 (R. 99-102). Petition for hearing in the Supreme Court of the State of California was granted and that court filed an opinion on September 3, 1935, which is reported in 48 Pac. (2nd) 678 (R. 102-106). Neither opinion is as yet officially reported.

II.

Jurisdiction.

1. The date of the judgment sought to be reviewed is September 3, 1935, and the date of the denial of the petition for rehearing in the Supreme Court of the State of California is October 3, 1935. Under Rule XXX of the Rules of the Supreme Court of California, a judgment of that court does not become final until the end of the thirtieth day after the date of pronouncement. The petition for rehearing was denied on the same day the judgment became final.

2. Your petitioner submits that this Honorable Court should review the decision of the Supreme Court of the State of California for the reasons relied upon in the foregoing petition, pages 3 to 9 hereof, which, in the interests of brevity, are not here repeated.

3. The jurisdiction of this Honorable Court is invoked under the provisions of the Judicial Code, Section 237, as amended by the act of February 13, 1925, 43 Stat. 938; 28 U. S. C. A. Sec. 344, subsection (b) thereof, wherein provision is made for certiorari to review a final judgment rendered or passed by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is especially set up or claimed by either party under a statute of the United States. The statute under which petitioner claims a right which has been denied to him is commonly known as the Jones Act, 41 Stat. 1007; 46 U. S. C. A. Sec. 688, in which is incorporated by reference the statute commonly known as the Federal Employers' Liability Act, 35 Stat. 65; 45 U. S. C. A. Secs. 51 to 59.

Section 237 of the Judicial Code, the Federal Employers' Liability Act and the Jones Act may be found in full in the Appendix to this brief.

4. The following cases are believed to sustain the jurisdiction of this Honorable Court:

Pryor v. *Williams*, 254 U. S. 43, 65 L. Ed. 120, certiorari granted;

Chicago, Milwaukee & St. Paul Ry. Co. v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041, certiorari granted;

Pacific Steamship Co. v. *Peterson*, 278 U. S. 130, 73 L. Ed. 220, certiorari granted;

Northwestern Pacific R. R. Co. v. *Bobo*, 290 U. S. 499, 78 L. Ed. 462, certiorari granted.

III.

Statement of the Case.

A summary statement of the case appears in the petition filed herewith but for the sake of completeness and in order to comply with subsection (d) of Section 2 of Rule 27 of this Court, the following statement is made:

Respondent, a seaman employed on the vessel "Fort Bragg", a coastwise vessel engaged in the carriage of lumber, was injured aboard the ship while unloading part of a deckload of lumber on to a dock at Vallejo, California.

The respondent was an able-bodied seaman, knowing no other vocation. He had been a seaman since 1908 (R. 13), and at the time of the alleged injuries he was forty years of age (R. 30-31), and had had eight years of experience on lumber vessels (R. 43).

The "Fort Bragg" was a single-ended steam schooner 188 feet in length (R. 52), engaged in the coastwise trade, carrying lumber below and on deck, a general cargo in the hold (R. 34), and petroleum products in large upright steel tanks set on her deck for that purpose. She had only one hatch equipped with gear fore and aft (R. 85). The hatch was surrounded by the usual hatch coamings, about two and

a half feet high (R. 64), and outboard of the coamings, running fore and aft along the deck, were heavy structural timbers known as "stringer pieces."

At the forward and after end of the hatch were two oblong upright tanks extended outboard from the square of the hatch for a distance of a little more than three feet. The distance from the port coaming to the port rail was about eight feet (R. 18, 19, 20).

While in the Columbia River district, the vessel had loaded lumber of various sorts on deck and in the hold, consigned to Vallejo and Mare Island (R. 72). She had also taken on 100 pieces of timber 12 x 14 inches, 52 feet in length (R. 52). The space between the two tanks fore and aft was only 45 feet, insufficient to accommodate the length of the timbers (R. 75). Consequently they were placed between the tanks and the rails and flush with the ship's sides.

After the timbers were in place, a space remained between the tanks and the hatch coamings, about 45 feet in length and about 40 inches wide (R. 21-22). Lumber was laden in this space at Coos Bay (R. 67). Bundles of laths were first stowed in this space even with the top of the hatch coamings (R. 64). On top of these laths, 1 x 12 lumber on the port side had been stowed in by hand, one piece at a time, above the hatch coamings as high as the men could reach (R. 68), and then other lumber was landed on top of the hand stowed lumber and left in slingloads as it came from the dock without being piled piece by piece, as was the lumber underneath (R. 68).

On May 4, 1931, which was a Monday, the "Fort Bragg" lay at a dock at Vallejo, California, having come from San Francisco the preceding Saturday. Somewhere in the neighborhood of nine o'clock in the morning of Monday, the respondent was working on the deckload on the port side forward and next to the hatch on the lumber between the

hatch coaming and the heavy 52 foot timber (R. 52). While attempting to place a cargo sling around a slingload of lumber and while standing on hand stowed lumber (R. 87), he fell into the hold of the vessel.

At the time the respondent fell he was up some distance above the hatch coamings, about four or five feet (R. 89). He and his partner, Walter Paul, were preparing one of the landed loads, (*i.e.*, a slingload stowed as it came from the dock), of lumber to be slung ashore in ship's tackle. The hatch covers were off of the hold at this time (R. 70), and had been since the vessel arrived in San Francisco the preceding week.

There was lumber in the hold to be discharged at Vallejo but at the time of and during the hour or so of work prior to the time of the accident, no cargo was being or had been taken from the hold (R. 70, 72). All the lumber on deck and in the hold, with the exception of some for Mare Island, was consigned to the Vallejo Lumber Company at Vallejo, California (R. 73). Neither the chief mate nor the captain of the vessel knew when the lumber in the hold consigned to Vallejo was to be unloaded (R. 70, 74). Up until the time of the accident, no order had yet been received by the vessel to discharge the lumber in the hold (R. 73), but all the lumber consigned to Vallejo on deck and in the hold was subject to the call of the consignee at any time (R. 74).

After the vessel had moved to Vallejo on Saturday and the crew had knocked off Saturday afternoon (R. 34-35), a line was stretched around the edge of the deckload to prevent persons coming aboard the vessel at night from falling into the hold (R. 30). Before the crew turned to on Monday morning, this line was removed (R. 31). It was impractical to discharge the deckload with such a line in place (R. 50).

It will be noted from the specific acts of negligence alleged (R. 2-3), and the opening statement (R. 13), that re-

spondent attributed his fall into the hold to the fact that some of the lumber under his feet shifted or toppled and that this occurred because the lumber he was standing on was a landed slingload, as distinguished from stowed or hand piled lumber.

Lumber that is hand piled is taken piece by piece and laid down one piece on top of another until the lumber has been built up for a distance of 12 inches. Laths are then placed across the lumber at intervals. The lumber is then built up for another 12 inches and the laths are put in as before (R. 67, 68). A landed slingload is one that is put on the ship just as it comes from the dock (R. 27, 38-39). Slingloads are not all alike. They all have laths or binders between the pieces of lumber but some have more than others.

In support of his contention respondent testified that the lumber he was standing on was a landed slingload; that it was stowed lumber, and that he didn't know what it was (R. 44, 46). Petitioner's witness testified that the lumber respondent was standing on at the time he fell was hand stowed 1 x 12 (R. 78, 87).

Respondent also testified that he and his partner were preparing to take out a landed slingload. Respondent first placed a light wire sling, called a pick-up sling, underneath the forward end of the load and the forward end of the load was then raised up by the falls from the forward winch. The purpose of this was to enable the respondent to place around the load a heavier sling known as a cargo sling, which would then be pulled midships of the load by respondent's partner, Paul, who meantime was standing on top of the load that was in the pick-up sling (R. 40-42).

Respondent pushed one end of the cargo sling under the upraised end of the load from the outboard side towards the hatch and was either reaching for the end of the sling next the hatch or pulling it out to hand to his partner when

he slipped, lost his balance, the outer tier of lumber shifted or gave way, or some lumber turned under his foot (R. 40-42, 49).

Plainly, the reason why respondent fell was because the edge of the deckload shifted or gave way under his feet or because he was performing his work in an unskillful manner. It was therefore incumbent on the respondent to show negligence in the stowage of the deckload at the point where the accident occurred. He attempted to do this by submitting some evidence that the deckload at the point from which he fell was a landed slingload of lumber and that it was customary to hand pile the lumber at the edge of deckloads.

Negligence was charged in several particulars set forth in the amended complaint (R. 2-3), but the issue of negligence really came down to the safety of the place of employment and what it was that caused the respondent to fall. Was it because he was standing on a landed slingload of lumber, or was he, at the time he fell, standing on lumber which had been hand piled? This last question became the subject of ultimate inquiry as far as the issue of negligence is concerned. The answer denied negligence and set up as an affirmative defense the assumption of the ordinary and obvious hazards of the employment (R. 6-7).

The evidence in support of the issue of assumption of the risk disclosed the following facts: Respondent was not an articled seaman but, on the contrary, was employed substantially at will and could quit voluntarily without penalty or forfeiture except that there would be three days delay in giving him his pay (R. 14, 45). If he was discharged for disobedience he had to be paid immediately (R. 45). He was paid just like a land employee and signed the payroll (R. 51). The ship's hold was open, which fact was admittedly known to respondent, who made no protest concerning this condition (R. 30, 32). In fact he assisted in

removing the hatch covers at San Francisco before the ship sailed for Vallejo (R. 47). The lumber on which he was working was so close to the open hold that if he fell he would almost certainly fall down into it. When discharging, it is not practical to keep the hatches closed because lumber in the hold may be wanted (R. 71), and there is no method of knowing in advance when the need for discharging from the hold may arise (R. 70). Respondent also knew that no safety lines or other safeguards were present to prevent him falling into the hold should he slip from his place of work (R. 31, 50). There was evidence given on behalf of petitioner that he was standing, at the time he fell, on hand stowed lumber of the dimension of 1″ x 12″ (R. 87), and hand stowed or piled lumber is, according to respondent, good and proper stowage (R. 24). He was, at the time of his injury, pursuing a method of work in disobedience of specific orders and instructions (R. 53, 59, 60, 61, 82). There were other and safe ways of performing the operation in which respondent was engaged at the time he fell (R. 58, 59). There were appliances called pick-up hooks (R. 58), which could have been used, available aboard the vessel (R. 55), and which respondent did not use. Respondent had been a seaman since 1908 (R. 13), was thoroughly experienced, had made other voyages on the "Fort Bragg" and other lumber carriers, and had had at least seven or eight years experience in loading and discharging lumber carriers (R. 43).

IV.

Specification of Errors to be Urged.

1. The Supreme Court of California erred in holding that in a case brought under the Jones Act by a seaman employed on a coastwise vessel in the lumber trade not

under articles and not acting under compulsion, to recover damages for injuries sustained by him as a result of falling into the hold of a vessel engaged in discharging cargo at a dock, where the defense of assumption of the ordinary risks and hazards of the employment had been pleaded and evidence in support thereof had been given, it was not reversible error for the trial court to refuse all instructions on that issue tendered by petitioner.

2. The Supreme Court of California erred in holding that in such a case where the negligence charged was furnishing the respondent an unsafe place to work, the defense of assumption of the ordinary risks and hazards of the employment is not available to the employer.

3. The Supreme Court of California erred in holding that in such a case where there was evidence that respondent had adopted a dangerous method of work when there was a safe method available to him, it was not reversible error to refuse to give an instruction tendered on that issue by petitioner to the effect that respondent assumed the risk of any injury proximately caused by such dangerous method and could not recover.

4. The Supreme Court of California erred in holding that in such a case where there was evidence that the respondent was performing his work in a manner contrary to specific instructions given him in that regard, it was not reversible error to refuse to give an instruction tendered on that issue by petitioner to the effect that respondent had assumed the risk of injury proximately caused by, and sustained while, acting in disobedience of instructions and could not recover.

5. The Supreme Court of California erred in holding that in such a case where there was evidence that the respondent was injured by falling into an open hold when the vessel was engaged in discharging cargo, it was not

reversible error to refuse to give an instruction tendered on that issue by petitioner to the effect that respondent assumed the risk of injury proximately caused by falling into such hold and could not recover.

6. The Supreme Court of California erred in holding that in such a case where there was evidence to support the defense of assumption of the ordinary risks and hazards of the employment, it was not reversible error to refuse to give an instruction on the legal effect of assumption of the risk, namely, that if proven it was an absolute defense and respondent could not recover.

7. The Supreme Court of California erred in holding that in such a case where there was evidence that the respondent was injured by falling into an open hold when the vessel was engaged in discharging cargo; it was not reversible error to refuse to give an instruction tendered on that issue by petitioner to the effect that the maintenance of an open hold during discharging was not negligence and could not be considered as such.

8. The Supreme Court of California erred in holding that in such a case it was not reversible error to refuse an instruction tendered by petitioner to the effect that respondent's injury could not have been proximately caused by the existence of an open hold.

9. The Supreme Court of California erred in holding that in such a case it was not reversible error to instruct the jury that in determining whether or not the employer had furnished a safe place of work the jury must consider not one condition alone at the time and place, but the whole situation as presented by the evidence at the time of the accident.

V.

Summary of Argument.

1. Under the applicable decisions in actions brought under the Federal Employers' Liability Act, the defense of assumption of the ordinary and obvious hazards of the employment is reserved to the employer by the fourth section of the Act.

2. The Jones Act confers upon seamen all the rights and remedies of railroad employees in interstate commerce and specifically incorporates the Federal Employers' Liability Act by reference.

3. In an action under the Jones Act brought by a seaman who was injured by falling into an open hold and who, at the time of his injury, was not acting under compulsion, and who was engaged in discharging lumber cargo from a vessel to a dock, the defense of assumption of the ordinary and obvious hazards of the employment is preserved to the maritime employer and if the defense is pleaded and evidence in support thereof introduced, the jury should be instructed on the legal effect of the defense that it is a complete defense and a bar to recovery if made out.

4. In the instant case the defense was pleaded. The evidence shows knowledge and appreciation of the ordinary and obvious hazards of his employment by a seaman of long standing, especially experienced in the stowing and discharging of lumber cargoes on Pacific Coast coastwise ships engaged in the lumber trade.

The evidence shows knowledge of an open hold in close proximity to the place of work; adoption of a dangerous method of work when safe methods could have been pursued; injury occurring as a result of disobedience of specific instructions given for respondent's safety not more than an hour previous to the injury.

5. All of these circumstances supported appropriate instructions involving the defense of assumption of the ordinary and obvious hazard of the employment. Such instructions were tendered by the petitioner and refused and no equivalent was given.

6. Instructions upon negligence and proximate cause given were so confused as to make it imperative for the jury to find the existence of an open hold negligence whereas it is not so as a matter of law, and further to find it the proximate cause of respondent's injuries when it could not be such in fact, and to disregard completely the issue of assumption of the risks of the ordinary and obvious hazards of the employment.

7. The refusal of the instructions tendered and the giving of the confused instructions on negligence and proximate cause resulted in the complete and prejudicial denial of petitioner's rights under the Jones Act, and the decision of the Supreme Court of California which brought about this result should be reviewed on certiorari and reversed.

VI.

ARGUMENT.

Before addressing our attention to the Specifications of Error, it may be well to call the attention of the court to the fact that *Section 647 of the California Code of Civil Procedure* provides in part that "giving an instruction although no objection to such instruction was made," and "refusing to give an instruction," or "modifying an instruction requested, are deemed to have been excepted to." Furthermore, the appeals in this case did not arise upon a bill of exception, but by the alternative method of a typewritten transcript provided for in Section 953a of the Code of Civil Procedure.

All of the errors complained of in this brief and accompanying petition were properly raised under California practice, and some, at least, were considered by the courts below. In this connection we call attention to an affidavit made by A. Don Duncan on the 19th day of December, 1935, found at the end of the additional record called for by respondent's Praecipe to the Clerk of the California Supreme Court, in which it is stated that Instruction No. V (R. 95), Instruction No. VII (R. 95), Instruction No. IX (R. 96), and Instruction No. XVI (R. 98) were not incorporated in petitioner's brief in the courts below in connection with the argument pertaining to them. An affidavit in answer to Mr. Duncan's affidavit, made by Webster Street on the 20th day of December, 1935, can be found in the Appendix to this brief. It appears from the affidavit of Mr. Street that no error is predicated in this brief upon Instruction No. V, Instruction No. IX, and Instruction No. XVI. Error is predicated upon Instruction No. VII, and is raised by the Third Specification of Error. It appears from Mr. Street's affidavit that Instruction No. VII was printed in full in the original brief of petitioner in the District Court of Appeal of California, and that an argument demonstrating the error arising from a refusal to give this instruction was made in that brief.

An implication is sought to be made by respondent that the underlined portion of the statement by counsel of defendant and appellant in appellant's opening brief, page 106, amounts to a waiver of all error predicated upon a refusal to instruct upon the issue of assumption of the ordinary risks and hazards of the employment. This implication is squarely negatived by Mr. Street's affidavit and the fact that the lower courts split on this issue.

First and Second Specifications of Error.

The Refusal to Give Any Instruction At All Upon Assumption of the Risk.

This is the vital issue in this case. The failure to give any instruction on the assumption of the risk was the reason why the District Court of Appeal of the State of California, First Appellate District, Division One, reversed the judgment of the trial court (R. 101). On the other hand, because it was of opinion that no such instructions were necessary under the facts in this case, the Supreme Court of California reversed the District Court of Appeal and affirmed the judgment below (R. 104-105).

There can, therefore, be no doubt of the significance and extent of the Supreme Court's opinion. It holds squarely and without supporting authority that when the issue of negligence in actions under the Jones Act is presented to the jury the trial court may, notwithstanding the evidence upon the question, withdraw the issue of assumption of ordinary risks of the employment from the jury's consideration. It is submitted this is not and never has been the law, nor can it be justified in the present case upon the ground that the particular issue of negligence was whether the petitioner had furnished the respondent with a reasonably safe place to work. In the last analysis, the only issue presented to the jury was whether the petitioner was or was not negligent, and no matter how this issue was determined, the petitioner was under the law entitled to have the issue of assumption of ordinary risks presented to the jury.

This action was brought under the Jones Act, which gives to seamen the rights and remedies available to employees in interstate commerce under the Federal Employers' Liability Act. The fourth section of that act preserves to the employer the defense of assumption of the ordinary risks

and hazards of the employment. In actions arising under the Federal Employers' Liability Act, this court has repeatedly held that the defense of assumption of the risk has been preserved by the act.

Seaboard Airline Ry. v. *Horton,* 233 U. S. 492, 58 L. Ed. 1062;
Pryor v. *Williams,* 245 U. S. 43, 65 L. Ed. 120;
Northwestern Pacific Ry. Co. v. *Bobo,* 290 U. S. 499, 78 L. Ed. 462.

Upon the authority of *Pryor* v. *Williams, supra; Southern Railway Co.* v. *Hermans,* 44 F. (2d) 366, and *Holy Cross Gold Mining Co. et al.* v. *O'Sullivan,* 270 Colo. 237, 60 Pac. 570, the District Court of Appeal held that in the instant case, under the pleadings and the evidence, the jury should have been instructed with regard to the defense of assumption of ordinary risks and hazards of the employment and the legal effect thereof (R. 101), and because of the failure to so instruct, reversed the judgment of the trial court.

It has been repeatedly urged throughout this litigation that the above authorities involve injuries sustained in the operation of railroads, and that consequently these authorities furnish no rule whatever for the application of the doctrine of assumption of the risk of the ordinary and obvious hazards in the case of seamen suing under the Jones Act.

Long before the Jones Act was passed, this Court said, in the case of *The Iroquois,* 194 U. S. 240, 48 L. Ed. 955:

> "A seafaring life is a dangerous one. Accidents of this kind are peculiarly liable to occur and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen."

There can be no doubt that the defense of assumption of the risk in suits brought by seamen prior to the passage of the Jones Act was available to their employers.

It is true that some of the inferior Federal and State courts have held that the entire doctrine of assumption of the risk is not applicable to seamen because of the peculiarities of their occupation which distinguish it from land occupation. The chief distinction between the two occupations is that the seaman at sea is acting under orders, disobedience to which may imperil the safety of vessel, persons on board, and the cargo. But in this case the respondent occupied no such position. He was on a vessel moored at a dock discharging cargo. He was injured early on Monday morning, having been ashore since the preceding Saturday afternoon. He had not signed articles and could have quit his job at any time he liked without penalty or forfeiture (R. 14, 45, 51). Under these circumstances there is no occasion for relaxing the rule of assumption of the risk because the reason upon which such relaxation is based does not exist. Other courts have found no difficulty in applying the rule of assumption of the risk in cases under the Jones Act where, as here, the seaman was not acting under compulsion. (*Skolar* v. *Lehigh Valley Ry. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing & Transp. Co.*, 1934 A. M. C. 441).

It is therefore submitted that when Congress saw fit to enlarge the privileges of seamen by conferring upon them the same rights and remedies as were conferred upon employees in interstate commerce by the Federal Employers' Liability Act, it fully intended to reserve to the maritime employer the same defense of assumption of risk that had been reserved to the land employer.

The gist of the opinion of the Supreme Court of California, and the reason why it affirmed the judgment of the

trial court is quite apparent in the following passage of the court's opinion:

> "The important issue was whether the plaintiff was furnished with a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the court specifically to instruct the jury as to whether the plaintiff had assumed the risk" (R. 104-105).

This Court holds, therefore, that wherever the issue of negligence is presented in the form that the employer did not furnish a safe place to work, the defense of assumption of the risk is inapplicable, no matter what the testimony upon that issue may be.

There can be no doubt that the defense of assumption of the ordinary risks and hazards of the employment is preserved to maritime employers under circumstances such as existed in the instant case by the Jones Act and its incorporation of the fourth section of the Federal Employers' Liability Act.

It remains, therefore, to consider whether the evidence in this case was of such a character as to entitle the petitioner to an instruction on the issue of assumption of the risk.

The evidence has already been stated both in the petition accompanying this brief and in the statement of the case on page 13 of this brief. That evidence showed not only that the respondent was an experienced seaman, but also that he had had about eight years specialized experience in loading and discharging lumber vessels on the Pacific Coast. It also showed that there were certain ordinary

hazards of his employment with which he was entirely familiar and which he must have appreciated. Nothing could be clearer than that an open cargo hatch is one of the inevitable hazards of working upon a vessel which is discharging cargo. It is equally clear that the work of unloading deckloads upon the edge thereof in close proximity to the hatch involves the obvious hazard of falling off into the hold below. It is submitted that there was substantial and direct evidence from which the jury could have found that the lumber the respondent was standing on at the time he fell was hand-stowed lumber (R. 87-88). The risk of falling from such lumber was an ordinary incident of his employment.

Instructions covering the defense of assumption of the risk were tendered by the petitioner and refused (Instructions Nos. II and III, R. 94, and generally the instructions discussed in Specifications of Error 1 to 6, inclusive). The petitioner was entitled to instructions upon this issue and the failure to give them has deprived the petitioner of a substantial right accorded to him under the Jones Act and the Employers' Liability Act.

Third Specification of Error.

The Refusal of Instructions Concerning Choice of Methods of Work.

The evidence showed that the respondent was pursuing an unnecessarily dangerous method of work when other and safe ways were available to him.

This is but another phase of assumption of the risk. It is a well established principle of the law of master and servant and a principle applied in injuries to maritime workers, that if there are two ways, one safe and the other

dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him.

Hardie v. *New York Harbor Drydock Corp.*, 9 F. (2d) 545;
Beulah Coal Co. v. *Verbrugh*, 292 Fed. 34;
Williams Cooperage Co. v. *Headrick*, 159 Fed. 34;
The Indrani, 101 Fed. 596.

Nor is the act of the servant in choosing the dangerous method to be considered as contributory negligence. The Supreme Court of California fell into this precise error and confused the principle of assumption of the risk with contributory negligence (R. 104). Although the two concepts seem often to overlap:

> "Whenever discrimination between them becomes necessary, the use of defective ways or works with notice of the defect and appreciation of the danger is held to be assumption of the risk and not contributory negligence." (*Seaboard Airline Ry. Co.* v. *Horton*, 233 U. S. 492, 503).

This rule applies to seamen as well as to other kinds of employees.

The Mandalay, 42 F. (2d) 437, 1930 A. M. C. 1390;
Holm v. *Cities Transp. Co.*, 60 F. (2d) 721;

where the court said:

> "Where the conduct of the injured seaman, however, is induced only by his own free will and he acts to his injury at a time and place when he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land."

The Romulus, 1926 A. M. C. 831, 833, where the court said:

> "These seamen, the libelant and Johansen, who were working with him, were able and skilled seamen and they were expected to use their experience and their skill in doing the work. It was not required of the ship that the ship should stand over these men and direct them exactly how they should do the work. That was a matter left to their judgment, their discretion and their experience, and so when they came to raise this ladder, the manner in which they desired to raise it was a matter left to their discretion and skill and they chose their own way in which to raise the ladder."

In *Crockett* v. *Bro[illegible]*, 271 Fed. 415, the seaman was apparently a seaman [illegible] the strict sense and although the court recognized the general rule that seamen constitute a peculiar class, it says:

> "We know of no rule in the maritime law which imposes upon the owner of a ship liability for an accident such as this. The unfortunate accident of which the plaintiff complains was the plaintiff's own manner of doing the work."

This rule is also followed under the Jones Act.

West Kentucky Coal Co. v. *Parker,* 229 Ky. 685, 17 S. W. (2d) 753;

The Mangore, 1933 A. M. C. 229.

Instructions on this precise issue, framed upon the authority of the above cases, were tendered by petitioner (Instruction No. VII, R. 95; Instruction No. XI, R. 97), and refused and no equivalent instruction was given.

Another phase of this same issue is presented by the evidence which showed that there were pick-up hooks aboard the "Fort Bragg" designed to be used in perform-

ing the precise operation in which respondent was engaged when he fell, and that the use of these hooks would have obviated any necessity for going inside the load and on to the extreme edge of the deckload as he did (R. 54-55).

This is but another phase of assumption of the risk and under the evidence on this issue the respondent assumed the risk.

The Mexoil, 25 F. (2d) 457;
Crockett v. *Brandt*, 271 Fed. 415.

Respondent has criticized these cases upon the ground that they did not arise under the Jones Act but, as was said in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, the Jones Act did not materially change the maritime law.

In further support of the proposition that seamen may not recover for injuries caused by their failure to use appliances, see *The Mangore*, 1933 A. M. C. 229, an action in admiralty under the Jones Act. The charge of negligence was the failure to furnish the seaman with goggles while working with a hammer and chisel. A piece of metal struck him in the eye and since it appeared that goggles were available and he did not use them, recovery was denied.

The instructions already referred to under this heading were amply sufficient to cover this particular branch. They were tendered and refused and no equivalent instruction was given. Once more the petitioner was denied substantial rights accorded to him by the Jones Act.

Fourth Specification of Error.

Refusal of Instructions Concerning Disobedience of Instructions Given for Respondent's Safety.

There was evidence to the effect that in doing his work at the time he fell into the hold, the respondent was deliberately disregarding instructions given him about an hour

previously for his safety (R. 53, 59, 60, 61). He had been told not to go inside the load toward the edge of the deckload. Petitioner's witness, Kruse, testified that this was just what respondent was doing when he fell (R. 82).

This issue concerning the disobedience of instructions presents still another phase of assumption of the risk.

Grunert v. *Bush Terminal Co.*, 47 F. (2d) 565.

It has been contended by respondent that this case was not decided under the Jones Act. This, however, is palpable error. The case was a death case and could have been brought under no law other than the Jones Act. The general maritime law gives no right of action for wrongful death. (*United States* v. *Lindgren*, 281 U. S. 38, 74 L. Ed. 686.) The Death on the High Seas Act is obviously inapplicable to the situation and no local law is relied on by the court. Incidentally, in this case, as in the case at bar, the charge of negligence was furnishing an unsafe place to work, and yet the court held that the defense of assumption of the risk was available to the maritime employer under the Jones Act.

Instructions on this issue were tendered by petitioner (Instruction No. VIII, R. 95), and refused and no equivalent instruction was given. This was the denial of another right given to petitioner by the Jones Act.

Fifth Specification of Error.

Refusal to Instruct that Maintenance of Open Holds During Loading and Discharge of Vessel is One of the Ordinary and Obvious Risks Assumed by Seamen.

The evidence showed that respondent was working on the edge of a deckload about four and a half feet above the hatch coamings (R. 89), and that the hatch coamings were two and a half feet high (R. 64). He was, therefore, work-

ing about seven feet above the deck. The extreme edge of the deckload was directly above an open cargo hold from which the hatches were removed by respondent himself prior to the accident (R. 47, 70). It also appeared that the hatch was not in use at the time of the accident, that is, that no cargo was being unloaded from there (R. 70, 73).

There was, therefore, evidence from which the jury could have found that an open hatch was an ordinary incident of the respondent's employment (R. 70, 73, 74). There is law, however, which would compel them to so find had they been properly instructed.

In *Smith* v. *United States,* 18 F. (2d) 110, the third officer of the steamer Douchet fell through the No. 2 hatch in the tween deck. In holding that he could not recover against the shipowner, the court said:

> "Open hatchways on a vessel which is loading or discharging are a necessity much of the time and no one realizes, or should realize more than the members of the crew that it is a danger which must exist and one of the risks incidental to the work in which they are engaged and which each of them must himself avoid."

An instruction on this issue was tendered by the petitioner (Instruction No. XIX, R. 98), was refused by the court and no equivalent was given. The refusal of this instruction or its equivalent and the one to the effect that the maintenance of an open hatch during loading or discharging is not negligence, denied to petitioner substantial rights given by the Jones Act.

Sixth Specification of Error.

Refusal to Instruct upon the Legal Effect of Assumption of the Risk and that if Proven to the Satisfaction of the Jury This Defense is a Complete Bar to the Action.

Such an instruction was tendered (Instruction No. II, R. 94). It was refused and no equivalent was given.

This instruction correctly states the law because assumption of risk, as distinguished from contributory negligence, is a complete defense.

Skolar v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893,

a case involving injuries to a seaman, in which the court said:

> "The Supreme Court has held that Congress, by eliminating the defense of assumption of the risk in the cases indicated, quite plainly intended that in all other cases such assumption should have its former effect as a complete bar to the action."
>
> *Southern Ry. Co.* v. *Hermans*, 44 F. (2d) 366.

When the courts themselves go to such length to distinguish between assumption of the risk and contributory negligence, it would seem that the distinction should be made clear to the jury. It is reversible error to confuse the two defenses in an instruction, (*Pryor* v. *Williams*, 254 U. S. 43, 65 L. Ed. 120), and this confusion may easily and almost certainly must arise when the distinction is left to the unguided action of the jury. As we have seen, the Supreme Court of California was itself confused in the very opinion rendered in this case (R. 104, 105). The courts regard the distinction between assumption of risk and contributory negligence as vital.

> "When each alike constituted a complete defense, the distinction was largely academic and it was natural

that the terms should be used with some confusion; but now that statutes have made differences in the defensive value of the two things, the distinction has become vital and has been the subject of much judicial inquiry.''

McMyler Mfg. Co. v. *Mehnke,* 209 Fed. 5.

The Jones Act incorporates the Federal Employers' Liability Act by reference and that act treats the defense of contributory negligence and assumption of the risk in two different and separate sections, (*45 U. S. C. A. Secs. 53, 54*).

There can be no doubt that the refusal to instruct the jury upon the legal effect of assumption of the risk denied to the petitioner a very substantial right under the Jones Act.

The Georgine, (*McGinn* v. *North Coast Stevedoring Co.*), 149 Wash. 1, 270 Pac. 113, 1929 A. M. C. 488.

We have thus far covered six of the Specifications of Error, all dealing with various phases of assumption of the risk. While it has not been said in the discussion of each particular specification that there was evidence tending to show that respondent knew and appreciated the dangers of various risks involved, the fact that he did is clearly substantiated by the record. He knew the hold was open and had been since the vessel left San Francisco, because not only had he participated in removal of the hatches but he could see it below him from his position on the edge of the deckload directly above it. As an experienced seaman, specially skilled in the lumber trade and the loading and discharging of cargoes of lumber for a period of eight years, he knew there were pick-up hooks aboard the vessel and he knew the dangers of walking upon the extreme edge of a deckload directly above an open hold below him. Hence, viewed from any angle, the defense of assumption of the risk was amply substantiated by the evidence.

It must undoubtedly occur to the court to wonder why the issue was not raised long before instructions were requested. As a matter of fact it was. Motions for non-suit, directed verdict and judgment notwithstanding the verdict were all made and denied and the only reason that this fact does not appear in the record is that the questions involved are sufficiently raised by the instructions requested and refused, and to print the preliminary efforts to raise the question of assumption of the risk would have been a violation of the court's desire for brevity and conciseness.

Seventh Specification of Error.

Maintenance of Open Cargo Hold During Loading and Discharging is not Negligence.

Quite apart from any question of assumption of the risk, an open hatchway on a ship while in port is not evidence of neglect on the part of the shipowner, but on the contrary, the shipowner has a right to allow the hatchways of his ship to remain uncovered and unprotected except by the usual coamings.

Dwyer v. *National S. S. Co.*, 4 Fed. 439;
The Gladiolus, 21 Fed. 417;
The Kongosan Maru, 282 Fed. 666;
Long v. *Silver Line*, 48 F. (2d) 15.

Respondent in the courts below relied upon the fact that the hold of the "Fort Bragg" was not actually in use at the time he fell, but the same rule applies whether this is so or not.

Campbell v. *Trinidad Shipping & Trading Co.*, 165 Fed. 270;
Horne v. *George H. Hammond Co.*, 71 Fed. 314.

An instruction on this issue was tendered by petitioner (Instruction No. VI, R. 95), refused and no equivalent was given.

Eighth and Ninth Specifications of Error.

Instructions Given and Refused Concerning the Open Hold in Relation to Safety of Place of Work and Proximate Cause.

Under this grouping of specifications of error, it is convenient to consider the combined effect of Respondent's Instruction No. III (R. 89), Respondent's Instruction No. IX (R. 90), given by the court, Instruction No. XV-a (R. 91), given by the court of its own motion, and Petitioner's Instruction No. II (R. 91), as amended and given by the court. The effect of these four instructions was three-fold. In the first place it permitted the jury to take into consideration the open hold as an element of negligence whereas it is not negligence as a matter of law to have the holds open when vessels are loading and discharging. In the second place, these instructions allowed the jury to find that the open hold constituted the negligence which proximately caused the respondent's injuries. And lastly, the instructions completely withdrew from the jury all question of assumption of the risk because the jury was commanded to consider the ordinary and obvious hazard of an open hold as an element of negligence.

Plaintiff's Instruction No. III given by the court (R. 89), charged negligence in three respects: First, negligent loading of the cargo; second, negligent securing of the cargo; third, negligence in leaving the hold open while the deckload was being unloaded. The instruction then concluded with the following language:

> "In other words, plaintiff alleges that the defendant negligently failed to furnish plaintiff with a reasonably safe place to work.
>
> "If you find that defendant did not provide plaintiff with a reasonably safe place to work, then defendant

was guilty of negligence and plaintiff can recover judgment against defendant, providing you find also that said negligence was the proximate cause of plaintiff's injuries."

This instruction quite plainly told the jury by the use of the phrase "in other words," that in determining whether the plaintiff's place of work was reasonably safe they were to consider the fact that no blocking had been placed around the lumber and the fact that the hatch was open. It is an outstanding example of a "roving commission." The court thereafter instructed the jury that:

> "The lumber on the deck next to an open hold, • • • constituted the place furnished by the defendant employer for the prosecution of further work" (Plaintiff's Instruction No. IX, R. 90).

and that:

> "If you find that such place of work as here described was not reasonably safe, you are instructed that it was negligence on the part of the defendant to furnish such a place of work" (Plaintiff's Instruction No. IX, R. 90).

Here again the jury were told to consider the open hold and to decide whether that fact rendered the plaintiff's place of work unsafe. This was error enough, but the court then instructed the jury that they must consider, in addition to the fact that the hold was open, everything else presented by the evidence.

At a previous stage of the case much had been made of the absence of a safety line but it developed from respondent's own witness, Paul, that a safety line was used only at night when no discharging was going on and for the purpose of preventing people from falling into the hold from the deckload, but that it was utterly impractical to have this

safety line in position when cargo was being unloaded. This was one of the elements of "the whole situation as presented by the evidence at the time of the accident", which the jury was told by the court's own instruction that it "must consider." This amazing instruction is as follows:

> "The law says the defendant must furnish a reasonably safe place for a seaman to work, meaning a reasonably safe place to work under all the circumstances of the business.
>
> "In order to determine whether defendant provided plaintiff with a reasonably safe place to work you must consider not one condition alone at the time and place, but the whole situation as presented by the evidence at the time of the accident."
>
> (Instruction No. XV-a, R. 91)

To instruct a jury that they may consider facts such as the existence of an open hold during loading and discharging, which are neither negligence nor the proximate cause is evil enough, but to instruct them that they must do so is to allow a verdict for plaintiff merely because the situation looks dangerous. A jury could hardly do anything else but return a verdict for the plaintiff under such instructions as these and they amounted in effect to a direction of a verdict for the respondent.

The principal issue in this case upon the question of negligence is whether the lumber on which respondent was standing at the time of his fall was hand stowed, as petitioner's witness, Kruse, said it was (R. 87-88), or landed in slingloads as it came from the dock, as respondent claimed. This was an issue which the petitioner was entitled to have presented to the jury and the court's instruction on the issue of safe place to work clearly deprived petitioner of that right so far as it was of any value in avoiding liability. Even if the petitioner succeeded in proving, by the prepon-

derance of the evidence, that the lumber respondent was standing on at the time he fell was hand stowed lumber, the jury, under the foregoing instructions, might return a verdict for the plaintiff nevertheless. The instructions were literally broadsides from which the respondent intended there should be no escape and the trial court made doubly sure that there should be no escape by refusing to instruct the jury that the open hold was not the proximate cause of respondent's injuries.

Petitioner proposed the following instruction, which the court refused:

> "There can be but one proximate cause of an injury and you are instructed that under the circumstances of this case the fact that the hatches were off at the time the plaintiff fell, cannot be and is not the proximate cause of the plaintiff's injuries" (Instruction No. XIV, R. 97).

The open hold was the dramatic element of this case and its presence was constantly brought to the attention of the jury. It was only by requesting instructions on the issue of what caused the plaintiff to fall, and by asking the court to eliminate the matter of the open hold, that petitioner could cure the error in respondent's instructions that the jury could consider the open hold, an element that was present in each of respondent's instructions concerning the issue of a safe place to work.

Petitioner's Instruction No. II (R. 91), was a further attempt to eliminate the issue of the open hold but as amended by the court and given, this instruction was deprived of any value it might have had.

It is too clear for argument that the open hold did not cause the respondent to fall. Had it been closed he would, under the evidence in this case, have fallen just the same.

The fact that the hold was open merely increased the length of his fall.

It was not negligence to leave the hold open during the loading and discharging of cargo as has already been abundantly established. In *Campbell* v. *Trinidad Shipping & Trading Co.* 165 Fed. 270, the libelant was a member of the crew. The hatch had been left open during the day for purposes connected with the cargo of the vessel. The accident happened in the evening about seven o'clock while the hatch covers were not in position. The court said:

> "It is evident that he (libelant) would not have been injured if the hatch covers had been in place, but no negligence or failure of due care toward the crew can be presumed from that fact."

Under the settled principles of federal law, in an action under the Employers' Liability Act, or what is the same thing, under the Jones Act, negligence cannot be presumed and it must have proximately caused the injuries.

Northwestern Pacific R. R. Co. v. *Bobo,* 290 U. S. 499, 78 L. Ed. 462;

Atchison, Topeka & Santa Fe Ry. Co. v. *Saxon,* 284 U. S. 458, 76 L. Ed. 397.

In this case, under the instructions discussed in this heading, negligence was presumed from a non-negligent act, i.e. leaving the hold open, and the jury was in effect peremptorily instructed to consider this non-negligent act not only as an act of negligence but also as the proximate cause of the respondent's injuries.

Furthermore, inasmuch as the court refused to instruct on assumption of the risk in any form whatsoever, the effect of the said instructions was to withdraw that issue from the jury entirely.

That this was a denial of substantial rights given to petitioner by the Jones Act is too apparent for further discussion.

Conclusion.

Respondent has in the courts below strenuously urged that the verdict of the jury precludes any further consideration of assumption of the risk or proximate cause. The theory is that the jury's verdict establishes negligence in failing to provide a safe place to work. This being so, respondent then argues that no workman on land or sea ever assumes the risk of his employer's negligence. This argument borders on nonsense. The trouble and the reason why we are seeking certiorari is much more deepseated and antedates the rendition of the verdict. Had the petitioner's undoubted rights under the Jones Act been carefully preserved by the court in instructing the jury, the verdict might well have been different. In fact, the Supreme Court of California said that instructions such as were asked would have been tantamount to a directed verdict (R. 105).

The California Supreme Court apparently sought to justify its decision by a glaring misstatement of the record. It said:

> "There was undisputed evidence * * * that a portion of the landed lumber toppled with the plaintiff, causing him to fall into the hold" (R. 104).

This was specifically called to the attention of the court in the petition for rehearing. While it was undisputed that the slingload which respondent and Paul were trying to get out of the ship was landed lumber, the most hotly disputed point in the case was whether respondent was standing on a landed slingload or on hand stowed lumber at the time he fell. His whole theory of negligence was built upon the ground that it was bad practice to use landed slingloads as they came from the dock rather than hand piled lumber,

which latter method he said was good stowage (R. 24). His contention was that because the lumber he was standing on was a landed load and not hand piled, is the very reason why it was not secure and the only reason why it toppled with him (Opening Statement, R. 13). Kruse's testimony on this issue is clear and unmistakable. While describing where respondent was standing at the time he fell, this witness said:

> "His feet was on the edge of the stowed lumber what was underneath the load what was hanging in the pick-up sling" (R. 88).

Assumption of the risk of ordinary and obvious hazards is not a popular defense in California. It has in large measure been abolished by statute. The Supreme Court of California has in this case abolished it by judicial fiat in all future cases brought under the Jones Act in this state.

As was said by Mr. Justice McReynolds in *Atchison, Topeka & Santa Fe. Ry. Co.* v. *Saxon,* 284 U. S. 458, 76 L. Ed. 397, particularly at p. 398:

> "This court has been obliged to grant certiorari many times to protect interstate carriers against unwarranted judgments and enforce obedience of the liability act as here interpreted."

The force of these remarks is not diminished by fact that the instant case arises under the Jones Act.

It is, therefore, respectfully submitted that the Writ should issue in accordance with the prayer of the petition.

Respectfully submitted,

HAROLD M. SAWYER,
Attorney for Petitioner.

APPENDIX.

Judicial Code, Section 237, as amended (R. S. Secs. 690, 709; Mar. 3, 1911, c. 231, Secs. 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937).

Appellate jurisdiction of decrees of State courts; certiorari.

(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained

as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: *Provided,* That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title.

Federal Employers' Liability Act (Apr. 22, 1908, c. 149, 35 Stat. 65).

SEC. 1. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or

death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. *Carriers in Territories or other possessions of United States.*

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. *Contributory negligence; diminution of damages.*

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. *Assumption of risks of employment.*

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. *Contract, rule, regulation, or device exempting from liability; set-off.*

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. *Actions, limitations; concurrent jurisdiction of courts; removal of case in State court.*

No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

SEC. 7. *Who included in term "common carrier."*

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. *Duty or liability of common carriers and rights of employees under other Acts not impaired.*

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

SEC. 9. *Survival of right of action of person injured.*

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. (Apr. 5, 1910, c. 143, Sec. 2, 36 Stat. 291.)

The Jones Act (Mar. 4, 1915, c. 153, Sec. 20; 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007).

Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 676.

GEORGE S. BEADLE, *Petitioner,*

vs.

ALFRED SPENCER.

Affidavit of One of Petitioner's Attorneys in Answer to "Affidavit of Attorney for Plaintiff Regarding Defendants's Failure to Object to Omission of Certain Instructions".

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Webster Street, being first duly sworn, deposes and says:

That he was one of petitioner's attorneys throughout the entire litigation in the California courts wherein respondent was plaintiff and petitioner was defendant, and in active charge thereof; that he prepared all of the briefs filed on behalf of petitioner in the District Court of Appeal of the State of California, First Appellate District, Division One, and in the Supreme Court of the State of California; that he has read and is familiar with the contents of an affidavit made by A. Don Duncan on the 19th day of December, 1935, which is incorporated in the additional record designated by respondent for use in the above-entitled cause; that he has read and is familiar with petitioner's brief to be filed in support of petitioner's application for a writ of certiorari in the above-entitled cause, and that in said brief no reliance whatever is placed upon Instruction No. V (R. 95); Instruction No. IX (R. 96), and Instruction No. XVI (R. 98);

That Instruction No. VII (R. 95), was set out in full

at page 70 of petitioner's opening brief, who was therein designated as appellant, in the District Court of Appeal of the State of California, First Appellate District, cause numbered 1 Civil No. 9190, and in the following four and a half pages of that brief, and ending on page 75 thereof, error was predicated upon the refusal to give such instruction;

That Instruction No. V (R. 95), was set out in full at page 108 of the said brief and in the following page and a half of said brief and ending on page 110 thereof, error was predicated upon the refusal to give such instruction;

Affiant has also read the statement entitled "Statement by counsel of defendant and appellant in appellant's opening brief, page 106," and particularly the underlined portion thereof to the effect that "the plaintiff would perhaps be entitled to have the case sent to the jury upon the issue of safe place to work." That said statement is found at page 106 of the brief hereinabove referred to in Section IV thereof, commencing at page 85 thereof, which section is headed as follows: "The Court erred to the prejudice of the appellant by specifically instructing the jury to consider matters which did not constitute negligence and were not the proximate causes and by refusing to give appellant's instructions limiting the issue of negligence and proximate cause." That in this section of the brief, as clearly appears from an examination thereof, affiant was dealing solely with the issue of negligence and proximate cause and not at all with the issue of assumption of the risk of ordinary and obvious hazards, which latter subject was discussed in detail from pages 19 to 47 and pages 49 to 85 of said brief; that immediately following this lengthy discussion of the defense of assumption of the risk of ordinary and obvious hazards, and at the

conclusion thereof, said Section IV of said brief, dealing solely with negligence and proximate cause, commences at page 85 thereof.

Further affiant saith not.

WEBSTER STREET.

Subscribed and sworn to before me this 20th day of December, 1935.

[SEAL]

LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

Admission of Service.

Receipt of a copy of the within Petition and Brief is hereby admitted at San Francisco, California, this 23rd day of December, 1935.

A. DON DUNCAN,
Attorney for Respondent.